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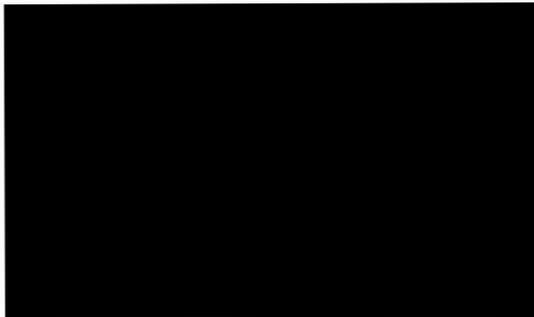
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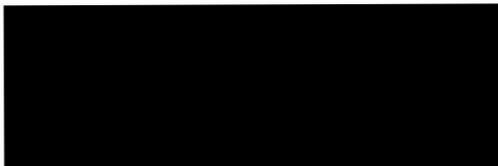
IN RE:

Applicant:



APPLICATION: Application for Temporary Resident Status under Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: This matter is an application for temporary resident status as a special agricultural worker that was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act) because he had been convicted of three separate crimes involving moral turpitude. The director further determined that such ground of inadmissibility could not be waived pursuant to 8 C.F.R. § 210.3(e)(3)(i). Consequently, the director concluded that the applicant was not eligible to adjust to temporary resident status as a special agricultural worker and denied the application.

On appeal, counsel asserts that the applicant's criminal convictions did not render him inadmissible. Counsel contends that the applicant's convictions had been expunged pursuant to section 1203.4 of the California Penal Code. Counsel submits documentation in support of the appeal.

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Act and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

The regulations at 8 C.F.R. Part 210 do not contain a definition for either a felony or a misdemeanor. However, definitions for both of these terms are provided within the legalization program in the regulations at 8 C.F.R. Part 245a.

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted

sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) [formerly section 212(a)(9)] of the Act.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951).

The first issue to be examined in this proceeding is whether the applicant is admissible to the United States under the provisions of section 210(c) and section 212(a) of the Act.

The record contains two separate reports from the Federal Bureau of Investigation (F.B.I.) that are dated March 26, 1988 and February 14, 2007, respectively, court documents, and printouts from the California Department of Justice. These documents reflect the following relating to the applicant's criminal history:

- An arrest under the name [REDACTED] on September 26, 1977 by the Arvin, California Police Department for a misdemeanor violation of section 23102(a) [subsequently amended to section 21352(a)], Drunk Driving, of the California Vehicle Code. The record reflects that the applicant was convicted of this misdemeanor offense as well as a conviction for a misdemeanor violation of section 40508(b), Failure to Pay Bail, Fine, or Restitution, of the California Vehicle Code, on December 8, 1977 (case number [REDACTED]).
- An arrest under the name [REDACTED] on December 24, 1984 by the [REDACTED] California Police Department for a misdemeanor violation of section 148, Obstructing or Resisting a Peace Officer, of the California Penal Code. The record reflects that the applicant was convicted of this misdemeanor offense on January 8, 1985 (case number [REDACTED]).
- An arrest under the name [REDACTED] on March 26, 1985 by the Arvin, California Police Department for a felony violation of section 273.5, Inflict Corporal Injury Upon Spouse or Cohabitant, of the California Penal Code. The record reflects that the applicant was convicted of a misdemeanor violation of section 242, Battery, of the California Penal Code on April 16, 1985 (case number [REDACTED]).

An arrest under the name [REDACTED] on April 6, 1985 by the Arvin, California Police Department for a misdemeanor violation of section 21352(a), Driving Under the Influence, of the California Vehicle Code. The record reflects that the applicant was convicted of this misdemeanor offense on October 22, 1985 (case number [REDACTED])

- An arrest under the name [REDACTED] on April 1, 1987 by the Arvin, California Police Department for a misdemeanor violation of section 148.9, False Representation of Identification to a Peace Officer, of the California Penal Code and a misdemeanor violation of 12500(a) Driving Without a License, of the California Vehicle Code. The record reflects that the applicant was subsequently convicted of these two misdemeanor offenses on April 9, 1987 (case number [REDACTED])

In the notice of denial issued on October 17, 2007, the director stated that the applicant had been convicted of violations of section 148, Obstructing or Resisting a Peace Officer, section 148.9, False Representation of Identification to a Peace Officer, and section 273.5, Inflict Corporal Injury Upon Spouse or Cohabitant, of the California Penal Code and that these three convictions constituted crimes involving moral turpitude. However, the director failed to note that the applicant had also been convicted of four additional misdemeanor offenses, specifically violations of section 21302(a) [subsequently amended to section 21352(a)], Drunk Driving, and section 40508(b), Failure to Pay Bail, of the California Vehicle Code, on December 8, 1977, a violation of section 21352(a), Driving Under the Influence, of the California Vehicle Code on October 22, 1985, and a violation of section 12500(a), Driving Without a License, of the California Vehicle Code on April 9, 1987. In addition, a review of the record demonstrates that the applicant was not convicted of a felony violation of section 273.5, Inflict Corporal Injury Upon Spouse or Cohabitant, of the California Penal Code, but instead was convicted of a misdemeanor violation of section 242, Battery, of the California Penal Code on April 16, 1985 (case number [REDACTED]). A review of the applicant's criminal convictions and case law relating to crimes involving moral turpitude finds no support for a finding that any of the crimes for which the applicant had been convicted could be considered as a crime involving moral turpitude. Consequently the director's finding that the applicant is inadmissible as a result of criminal convictions is withdrawn.

Beyond the director's decision, the next issue to be examined in these proceedings is whether the applicant is ineligible under 8 C.F.R. § 210.3(d)(3) as a result of his multiple criminal convictions.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center [or other office] does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

As previously discussed, documents in the record establish the applicant has been convicted of seven separate misdemeanor offenses in case numbers [REDACTED]

On appeal, counsel contends that the applicant's convictions in case numbers [REDACTED] had been expunged pursuant to section 1203.4 of the California Penal Code. Counsel submits a court order issued by the South Kern Municipal Court, Arvin-Lamont Branch, State of California, County of Kern on October 20, 1992 in which the applicant's motion to change his previous pleas from guilty to not guilty and to dismiss charges in case numbers [REDACTED] was granted.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Id.* at p. 528.

The Board of Immigration Appeals (BIA) has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent decision on the issue, the BIA, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Id.* at p. 624.

The order issued by the South Kern Municipal Court, Arvin-Lamont Branch, State of California, County of Kern on October 20, 1992 dismissing charges brought against the applicant in case numbers [REDACTED] was not based upon any finding that procedural or substantive defects had occurred in these particular criminal proceedings or that the applicant's four misdemeanor convictions in these cases had been vacated on the merits. Therefore, the applicant remains "convicted" of all seven misdemeanor offenses cited above for immigration purposes. Within the provisions of section 210 of the Act and 8 C.F.R. Part 210, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States. It is noted that even if CIS did not consider the convictions in case numbers [REDACTED] the applicant would have enough misdemeanor

convictions to render him ineligible for temporary resident status as a special agricultural worker (i.e.three).

The record contains sufficient evidence to establish that the applicant has been convicted of seven separate misdemeanor offenses. The applicant is ineligible for temporary resident status as a special agricultural worker because he has been convicted of three or more misdemeanors pursuant to 8 C.F.R. § 210.3(d)(3). Consequently, the applicant is ineligible for temporary residence under the provisions of section 210 of the Act on this basis.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.